DIVISIONS I & IV

CA05-1047

December 6, 2006

PRO TRANSPORTATION, INC. APPELLANT	AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
v.	[No. CV 03-5544]
VOLVO TRUCKS NORTH AMERICA, INC. and VOLVO TRUCK CORPORATION	HONORABLE CHRIS PIAZZA CIRCUIT JUDGE
APPELLEES	SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

John Mauzy Pittman, Chief Judge

On September 20, 2006, we dismissed this appeal for lack of a final order because appellant Pro Transportation, Inc. (Pro), nonsuited related breach-of-warranty and negligence claims that were subsequently dismissed without prejudice and no Rule 54(b) certification was obtained from the trial court. On rehearing, Pro argues that the order appealed from should be regarded as final because it would be precluded by the statute of limitations from refiling those claims. We deny the petition for rehearing but issue this supplemental opinion to address Pro's arguments.

Statutes of limitation generally constitute an affirmative defense rather than a jurisdictional bar. *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (1997); Ark. R. Civ. P. 8(c). Likewise, res judicata is an affirmative defense that must be raised in the trial court and does not present a question of jurisdiction. *Pryor v. Hot Spring Chancery Court*, 303 Ark.

630, 799 S.W.2d 524 (1990). Thus, despite Pro's argument to the contrary, there is no jurisdictional impediment to its refiling the claims that it voluntarily nonsuited, and the possibility of piecemeal appeals, mentioned in *Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995), still exists.

Pro would have us examine, in each case and without benefit of citation or argument, the length and nature of the limitation period (and, presumably, any other affirmative defense that may be applicable) so as to decide the degree of likelihood that a nonsuited claim may be refiled. *Haile* does not require us to research these issues in order to determine our own jurisdiction, and such a procedure would be burdensome to this Court.

To invoke our jurisdiction, Pro was required to demonstrate that the order appealed from was final. This could have been easily done had Pro requested dismissal with prejudice of the nonsuited claims. It did not do so. It could also have been done had Pro obtained the certification of finality that Rule 54(b) requires when issues are outstanding. Pro could also, perhaps, have discussed the nonsuited claims in its brief, providing argument and authority to show that they were no longer viable and that the order appealed from was therefore final. However, even in this petition for rehearing, Pro maintains that the nonsuited claims are immune from the doctrine of res judicata. Here, Pro's case on all claims was fully presented to the jury. It was only after all the evidence was submitted and both sides had rested that Pro moved the trial court for dismissal without prejudice of the outstanding claims. We think that Pro's attempt to preserve these claims evinces a clear intent to refile and, in the absence of any showing to the contrary, its appeal was properly dismissed.

Rehearing denied.

HART, GLADWIN, GLOVER, and NEAL, JJ., agree.

VAUGHT, J., dissents.

LARRY D. VAUGHT, Judge, dissenting. I dissent from the denial of rehearing. Although the reasoning and authority of the majority appears to be sound on its face, I respectfully disagree because I believe that the law must make sense. If the progression of law is not logical it cannot be sustained, and the decision in this case is not a logical extension of prior case law. Like Judge Gladwin in his concurring opinion, I believe this case mandates an absurd conclusion. However, I would take the next logical step and correct the absurdity, or at least invite the Arkansas Supreme Court to do so.

I am most troubled by the fact that in this case there was no intent to refile shown. The majority, in its initial opinion of September 20, 2006, relies on *Haile v. AP&L*, 322 Ark. 29, 907 S.W.2d 122 (1995), and *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973), for the general rule that a party with several claims against another party may not take a voluntary non-suit on one claim and appeal judgment as to the other claim *when it is clear that the intent is to refile the non-suited claim*.[1] The emphasized language is never again mentioned in the opinion and because the issue was raised sua sponte by the court, neither party addressed its impact in their briefs. This case summarily abolishes the "clear intent to refile" requirement.

Both *Haile* and *Ratzlaff* are clearly distinguishable. *Haile* was a partial summary-judgment case where the appellant's attorney admitted in oral argument that he intended to

[1]In the majority's supplemental opinion, they characterize Pro's dismissal without prejudice of some of its claims as a *clear* intent to refile. This defies logic—a conclusion that requires inference can never be clear.

refile the non-suited claims. Likewise, *Ratzlaff* is also a partial summary-judgment case where the court specifically held that the appellant sought to circumvent the policy of a statute by holding two counts in abeyance while seeking the supreme court's opinion on the validity of the third count. Both of these cases rely on the "clear intent to refile" language, which is completely ignored by the majority here.

The other obvious distinction between *Haile*, *Ratzlaff*, and the case at bar is that this case went to a jury and a judgment was rendered. The majority, citing *John Cheeseman Trucking v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991), concludes that there is no logical reason why the rule of *Haile* should not be applied to jury cases. But again, there is no mention of the "clear intent to refile" language. In *Cheeseman* liability and damages were bifurcated and the appellant sought to appeal the liability judgment before the damages trial. Clearly, such a factual predicate has no logical bearing on the case at bar.

The importance of the "clear intent to refile" language is clarified by a brief look back in history. In *Ratzlaff*, Justice George Rose Smith quoted from *Woodruff v. State*, 7 Ark. 333 (1846):

> It is not in the power of a party to single out a single issue, even by the most solemn contract of record, and submit it to the consideration of the supreme court, so as to elicit the opinion of the supreme court upon the law or the fact of the particular issue. Such a judgment would not be final, as not embracing all the issues in the case, and consequently it could not become the subject of an appeal or writ of error. The real object of the parties was to take the opinion of the supreme court upon the question of law arising upon the demurrer to the second plea, but in order to receive the benefit of that decision it became absolutely necessary that the circuit court should pass upon all the issues joined.

Ratzlaff, 255 Ark. at 375, 500 S.W.2d at 380. Justice Smith also cited *Yell v. Outlaw*, 14 Ark. 621 (1854), which commented upon the quote from *Woodruff*. These two cases are the seminal cases on the issue at hand.

In *Woodruff*, the parties agreed by written contract to demur to a question of law then submit that question only to the supreme court and if reversed, remand the case back to the trial court for trial of the factual issues. The supreme court held that the order was not final and that the parties could not piecemeal the appellate process. Thus, the "clear intent" of the parties was to circumvent the appellate process and to "refile" the factual issues after the legal issues were decided.

In *Yell*, perhaps the only case where an actual jury was seated, several issues were joined for trial with separate defenses to each, but before the evidence was presented to the jury, the defendant raised the legal defense of *nul tiel record* (no such record). The court found for the defendant on this legal issue, and the plaintiff refused to proceed with trial and elected to file a petition for writ of error with the intent to try the factual issues if a reversal was obtained. Judgment was entered for the defendant on the whole case. The supreme court reasoned:

> In this case, where the judgment of the court below, in favor of the defendants, upon one good plea, going to the whole cause of action, was sufficient to bar it, and the plaintiff could not force the defendants, having the right to plead several matters, to withdraw their other defenses, the only course left for the plaintiff was to proceed with the trial, and to obtain or submit to a verdict of a jury upon the issues of fact, which they had been sworn to try.

Yell, 14 Ark. at 624. The court held that the most favorable construction for the plaintiffs was that they elected to take a non-suit although that may not have been their intention. Although the question of law the plaintiffs attempted to appeal was erroneously decided, the court

reasoned that "no writ of error lies to reverse the judgment consequent upon it." *Id*. In other words the plaintiffs, by making a conscious choice to piecemeal the case, lost their right to appeal the judgment of the court.

These two cases are the underpinnings of the rules that we are bound to follow in this case. Both decisions relied on the conscious decisions of parties to piecemeal an appeal. In *every* case cited and *every* case found, the record reflects that there was a clear intent of the party who non-suited a claim to refile that claim. Because that intent is not present in this case, I would grant the petition for rehearing.